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In The

# Supreme Court of the United States

October Term, 1997

STATE OF KANSAS,

*Plaintiff,*

v.

STATE OF COLORADO,

*Defendant,*

UNITED STATES OF AMERICA,

*Defendant-Intervenor.*

## COLORADO'S EXCEPTIONS TO THE SECOND REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

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## COLORADO'S EXCEPTIONS TO THE SECOND REPORT OF THE SPECIAL MASTER

The State of Colorado respectfully files the following exceptions to the Second Report of Special Master Arthur L. Littleworth dated September 1997:

1. Colorado excepts to the Special Master's recommendation that if the remedy in this case includes money damages, the 11th Amendment to the United States Constitution does not preclude damages to the State of Kansas from being based, in part, on losses incurred by water users in Kansas.

2. Colorado excepts to the Special Master's recommendation that the unliquidated nature of Kansas' claim

for damages does not bar the award of prejudgment interest.

Respectfully submitted,

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## QUESTIONS PRESENTED

1. Does the 11th Amendment to the U.S. Constitution bar the State of Kansas from recovering damages from the State of Colorado for losses sustained by individual water users in Kansas?

2. Is the State of Kansas entitled to recover prejudgment interest on unliquidated damages?

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## BRIEF IN SUPPORT OF COLORADO'S EXCEPTIONS TO THE SECOND REPORT OF THE SPECIAL MASTER

The State of Colorado submits this brief in support of its exceptions to the Second Report of Arthur L. Littleworth, Special Master.

## JURISDICTION

The original jurisdiction of the Court was invoked by the State of Kansas under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a)(1).

## STATEMENT OF THE CASE

This is an action concerning enforcement of the 1949 Arkansas River Compact, an interstate compact apportioning the waters of the Arkansas River between the States of Colorado and Kansas.[1] In the decades following adoption of the Compact, water users in both Colorado and Kansas continued to develop waters of the Arkansas River, primarily through increased well pumping. Report of Arthur L. Littleworth, Special Master (July 1994)

[1] The Compact was signed by Commissioners for Colorado and Kansas on December 14, 1948, and became effective on May 31, 1949, after it was ratified by the legislature of each state and consented to by Congress. Arkansas River Compact, Art. IX-A (printed in Appendix); Act of May 31, 1949, Ch. 155, 63 Stat. 145 (1949).

("First Report") at 113-15, 304. In 1984, Kansas complained for the first time about post-Compact well development in Colorado.[2] *Id.* at 155-56. The Arkansas River Compact Administration authorized an investigation in March 1985, but the representatives could not agree on how to conduct the investigation. *Id.*, App. 51-55.

In December 1985, Kansas filed a motion for leave to file a complaint against Colorado, which this Court granted in 1986. *Kansas v. Colorado*, 475 U.S. 1079 (1986). The case was bifurcated into a liability and a remedy phase, and trial on the liability phase began in September 1990 and concluded in December 1992. First Report at 24-25, 28. Experts for Kansas developed a computer model (the Kansas H-I Model) for the liability phase to predict diversions of water from the Arkansas River based on the Colorado priority system and crop demands, storage and release of water from reservoirs, consumption of water, return flows, and resulting stream flows along a 150-mile reach of the Arkansas River from Pueblo, Colorado, to the Colorado-Kansas Stateline. *Id.* at 229-34.

The Special Master filed his first Report with the Court in July 1994 setting forth his conclusions and recommendations on the liability issues. The Special Master recommended dismissal of Kansas' winter water storage

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[2] Kansas submitted a report to the Arkansas River Compact Administration concerning possible violations of the Arkansas River Compact caused by post-Compact well development in Colorado, the operation of a winter water storage program in Colorado, and the operation of Trinidad Reservoir. First Report at 153.

and Trinidad Reservoir claims, but found that post-Compact well pumping in Colorado had caused material depletions to usable Stateline flows in violation of the Compact, although additional evidence was necessary to quantify the amount of such depletions. First Report at 43, 263, 335-36. In its May 15, 1995 Opinion, the Court overruled all exceptions to the first Report, affirmed the Special Master's recommendations, and remanded the case to the Special Master for determination of unresolved issues in a manner not inconsistent with the Court's opinion. *Kansas v. Colorado*, 514 U.S. 675 (1995).

Following the Court's decision, the Special Master set hearings on two unresolved issues: evaluation of Colorado's efforts to comply with the Compact and quantification of depletions to usable Stateline flows caused by post-Compact well pumping in Colorado. Second Report of Arthur L. Littleworth, Special Master (September 1997) ("Second Report"), App. 1-2. He also required Kansas to file a statement of its position concerning a remedy for violations of the Compact, indicating whether Kansas sought damages in money, water, or a combination of both. *Id.*, App. 2. Over the course of several hearings, the Special Master heard testimony from the Colorado State Engineer about Colorado's efforts to comply with the Compact. The Special Master described Colorado's compliance efforts as showing "a most impressive record" and "remarkable" progress. *Id.* at 47.

At the outset of the hearing scheduled in October 1995, Colorado and Kansas stipulated to the amount of depletions for the 1950-85 period using the Kansas H-I Model as it had been revised by the Kansas replacement experts during the liability phase. Second Report at 11;

*see* First Report at 28-30, 236-54. It appeared that depletions for the period 1986-94 could be determined relatively easily by updating the data sets needed for the model. Second Report at 12-13. However, in the course of updating the model, the Kansas experts discovered another deficiency – a deficiency which had been pointed out by Colorado's experts during the liability phase. *Id.* at 21-23. The Kansas experts made changes to the H-I Model, which Colorado's experts criticized as selective and which had the effect of increasing predicted depletions to usable Stateline flows. *Id.* The nature of the dispute and the Special Master's recommendation on the changes to the H-I Model are set forth in the Second Report at 12-46. Although Colorado's experts believe there are deficiencies in the latest version of the H-I Model accepted by the Special Master, *id.* at 38-41, Colorado has not taken an exception to the Special Master's recommendation on depletions for the period 1986-94, preferring instead to accept the Special Master's invitation to address deficiencies directly in future proceedings. *Id.* at 37.

In accordance with the Special Master's order, Kansas filed a statement of its position regarding a remedy. Despite the difficulty in determining depletions to usable Stateline flows during this case, despite the fact that Kansas did not complain about a Compact violation until 1984, at the earliest, and despite the fact that the Special Master found that Colorado's actions were not deliberate or willful, Second Report at 77-78, Kansas is seeking money damages for depletions to usable Stateline flows dating back to 1950, including losses suffered by individual water users in Kansas and prejudgment interest.

Colorado asked the Special Master to rule on legal issues related to Kansas' claim for money damages to avoid the time and expense of preparing economic analyses premised on irrelevant damages theories, as had occurred after the Court's decision in *Texas v. New Mexico*, 482 U.S. 124 (1987), the first case to hold that money damages could be awarded as a remedy for breach of an interstate compact. *See* Second Report at 80-81. In addition, Colorado suggested that repayment of past depletions to usable Stateline flows in water rather than money might be a more equitable remedy, and that a water remedy would avoid the difficult process of attempting to determine money damages going back more than 45 years.

In his Second Report, the Special Master concludes that a suitable remedy may be in terms of money damages or water and that evidence should be received on a suitable remedy. Second Report at 72, 113 ¶6. The Special Master also concludes that if a suitable remedy in this case should include money damages, the damages should be based on Kansas' loss rather than on any gain by Colorado, subject to the overriding consideration that the remedy provide a fair and equitable solution. *Id.* at 75-84, 113 ¶7. However, the Special Master concludes that if the remedy includes money damages, the 11th Amendment does not preclude damages to Kansas from being based, in part, on losses incurred by its water users, subject to overall considerations of fairness. *Id.* at 85-104, 113 ¶8. Finally, the Special Master concludes that, whether the remedy includes money damages or repayment in water, the unliquidated nature of Kansas' claim does not bar an award of prejudgment interest and that the possible

award of prejudgment interest will depend upon future trial proceedings. *Id.* at 105-11, 113-14 ¶9.

Colorado takes exception to these last two recommendations.

## SUMMARY OF ARGUMENT

The Special Master has decided two important issues of law applicable to controversies between states in a manner inconsistent with this Court's precedents and policy.

First, the Special Master disregards this Court's decisions on the nature of quasi-sovereignty and the protection afforded to states by the 11th Amendment, and recommends that if the remedy in this case includes money damages, Kansas may recover damages from Colorado for losses suffered by individual water users in Kansas. This is directly contrary to the Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365 (1923), and is unsupported by any of the Court's cases.

Second, relying on a recent case in admiralty law, the Special Master declines to follow the common-law rule that prejudgment interest will not be awarded on unliquidated damages, and has determined that prejudgment interest is not precluded here. This case involves a good-faith dispute over the effects of well pumping on the flows at the Colorado-Kansas Stateline, effects which were not readily apparent, and of which Kansas did not

complain until 35 years after the first injury occurred. It is therefore a particularly inappropriate case for abandoning the traditional rule disallowing prejudgment interest on unliquidated damages.

Finally, both of the Special Master's determinations will have undesirable broader consequences. The Special Master's expansion of the concept of quasi-sovereignty will lead to confusion and increase the risk of double recoveries in other cases where a state represents its quasi-sovereign interests. Further, the unprecedented and unanticipated expansion of liability for breach of an interstate compact will discourage states from resolving their differences through interstate compacts and will encourage litigation between states in this Court.

## ARGUMENT

### I. THE 11TH AMENDMENT DOES NOT ALLOW KANSAS TO RECOVER DAMAGES FROM COLORADO FOR LOSSES SUFFERED BY INDIVIDUAL WATER USERS IN KANSAS

The issue in this case is whether, in an original action by one state against another for violation of an interstate compact apportioning the waters of an interstate river, the 11th Amendment permits the plaintiff state to recover damages from the defendant state for losses suffered by individual water users in the plaintiff state. This Court has understood the 11th Amendment "to stand not so much for what it says, but for the presupposition which it confirms;" namely, that "federal jurisdiction over suits against unconsenting States 'was not contemplated by the

Constitution when establishing the judicial power of the United States.' " *Seminole Tribe of Florida v. Florida*, 517 U.S. 609, ___, 116 S.Ct. 1114, 1122, 134 L.Ed.2d 252, 265 (1996), *quoting Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991), and *Hans v. Louisiana*, 134 U.S. 1, 15 (1890).[3] On the other hand, there is no dispute that the framers of the Constitution intended that this Court would have original jurisdiction over controversies between states and that there would be a surrender of state sovereign immunity to such actions. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328 (1934); *The Federalist*, No. 80, No. 81.

As the Special Master recognizes, this Court's decisions make it clear that if Kansas were suing to recover damages which would be directly turned over to its citizens, the claim would be barred by the 11th Amendment. *E.g., North Dakota v. Minnesota*, 263 U.S. 365 (1923); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883); Second Report at 90-91, 95. The Special Master distinguishes such cases on the basis that the recovery in this instance would not go to the individuals, but instead would be paid to Kansas. *Id.* at 88-89. In Colorado's view, the Special Master's conclusion circumvents the constitutional limitation placed on federal jurisdiction by the 11th Amendment

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[3] The 11th Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

and is based on a theory of sovereign trusteeship that has been rejected in other cases.

### A. THE FACT THAT KANSAS HAS A RIGHT TO SEEK RELIEF FOR INJURY TO ITS QUASI-SOVEREIGN INTERESTS DOES NOT GIVE IT THE RIGHT TO PRESENT AND ENFORCE INDIVIDUAL CLAIMS OF ITS CITIZENS.

Colorado recognizes that the Court has broad power to fashion a fair and equitable remedy between the signatory states for past violations of the Arkansas River Compact; however, that power must be exercised within the limits imposed by the Constitution. Allowing Kansas to recover losses sustained by individual farmers, as the Special Master recommends, Second Report at 103, would circumvent the 11th Amendment and greatly expand the concept of quasi-sovereignty.

It is well-settled that, in a case such as this, a state's quasi-sovereign interests are sufficient to support jurisdiction and the issuance of injunctive relief. The interests which Kansas is empowered to represent in this action, however, are independent of the interests of individual citizens. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 99 (1907); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).

A state's right to represent its quasi-sovereign interests in a controversy between states does not allow a state to make claims on behalf of individual citizens. This has been clear since *New Hampshire v. Louisiana*, 108 U.S. 76 (1883), where citizens of New Hampshire assigned their claims on bonds issued by the State of Louisiana to the

State of New Hampshire for collection. The Court recognized in that case that the 11th Amendment prevented the citizens who owned bonds from bringing suit on their own behalf against the State of Louisiana. 108 U.S. at 88. Therefore, the Court said, "the real question" was "whether a state can allow the use of its name in such a suit for the benefit of one of its citizens." *Id.* First, the Court rejected the argument that a state could prosecute such suits as sovereign trustee of its citizens. *Id.* at 89-90. Second, the Court rejected the argument that the Constitution granted states the right to prosecute the claims of their citizens in the federal courts:

> The evident purpose of the [11th] Amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued and, in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens. *Such being the case, we are satisfied that we are prohibited, both by the letter and the spirit of the Constitution, from entertaining these suits, and the bill in each of them is, consequently, dismissed.*

108 U.S. at 91 (emphasis in original).

These principles were further developed in *North Dakota v. Minnesota*, 263 U.S. 365 (1923), where a claim for damages for losses to individuals was coupled with a permissible claim by a state for injury to its quasi-sovereign interests. There, North Dakota sought both an

injunction and damages for flooding allegedly caused by drainage ditches in Minnesota. The Court found that North Dakota could seek an injunction against operation of the Minnesota ditches:

> [W]here one state by a change in its method of draining water from lands within its border increases the flow into an interstate stream, so that its natural capacity is greatly exceeded and the water is thrown upon the farms of another state, the latter state *has such an interest as quasi sovereign in the comfort, health, and prosperity of her farm owners* that resort may be had to this court for relief. It is the creation of a public nuisance of simple type *for which a state may properly ask an injunction.*

*Id.* at 374 (emphasis added). However, the Court held that North Dakota could not recover damages for losses to its inhabitants whose farms were flooded and whose crops were lost:

> North Dakota, in addition to an injunction, seeks a decree against Minnesota for damages of $5,000 for itself and of $1,000,000 for its inhabitants whose farms were injured and whose crops were lost. It is difficult to see how we can grant a decree in favor of North Dakota for the benefit of individuals against the state of Minnesota in view of the Eleventh Amendment to the Constitution, which forbids the extension of the judicial power of the United States to any suit in law or equity prosecuted against any one of the United States by citizens of another state or by citizens and subjects of a foreign state.

> . . . *The right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants threatened by the proposed or continued action of another state by prayer for injunction is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state.* For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux valley is denied for lack of jurisdiction.

*Id.* at 374-76 (emphasis added).[4]

The Court has repeatedly reaffirmed the distinction between proper *parens patriae* actions by states to vindicate quasi-sovereign interests and improper attempts by states to recover on claims of individual citizens. For example, in *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938)[5], the Court dismissed Oklahoma's attempt to recover assets from out-of-state shareholders of an insolvent bank on behalf of depositors. Although the state had assumed control of and title to the bank's assets, the Court found that the original jurisdiction proceeding was not proper:

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[4] The Court reviewed North Dakota's request for an injunction and for $5,000 in damages to the state on the merits, and found that North Dakota had not proven that Minnesota was responsible for the flooding. 263 U.S. at 388.

[5] *Oklahoma v. Cook* dealt solely with the Court's jurisdiction over cases in which a state is a party under Art. III, § 2, cl. 2. of the U.S. Constitution and not with 11th Amendment immunity, but the nature of the state's interests is the same in either case.

> To bring a case within that jurisdiction, it is not enough that a State is plaintiff. Nor is it enough that a State has acquired the legal title to a cause of action against the defendant, where the recovery is sought for the benefit of another who is the real party in interest.

304 U.S. at 392. The Court recognized that a state could invoke its original jurisdiction to vindicate quasi-sovereign interests:

> But this principle does not go so far as to permit resort to our original jurisdiction in the name of the State but in reality for the benefit of particular individuals, albeit the State asserts an economic interest in the claims and declares their enforcement to be a matter of state policy.

304 U.S. at 394. A long line of cases recognizes this important distinction. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982); *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) ("[A]n original action between two States only violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to specific individuals.")[6]; *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) ("[A] State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens."); *Hawaii v. Standard Oil*

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[6] *Cf.* 451 U.S. at 737 ("A State is not permitted to enter a controversy as a nominal party in order to forward the claims of individual citizens. But it may act as the representative of its citizens in original actions where the injury alleged affects the general population of a state in a substantial way." (citations omitted)).

*Co.*, 405 U.S. 251, 258 n.12 (1972) ("An action brought by one State against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals."). To allow Kansas to recover damages for losses sustained by individual water users in Kansas would create an unprecedented expansion of the concept of quasi-sovereignty at the expense of the 11th Amendment and the principle of sovereign immunity.[7]

### B. THE SPECIAL MASTER'S RECOMMENDATION IS BASED ON THE MISTAKEN ASSUMPTION THAT THE 11TH AMENDMENT IS NOT A FACTOR IN THIS CASE.

Notwithstanding the above principles, the Special Master concludes that the 11th Amendment is not a barrier to recovery of damages by Kansas for injuries suffered by individual farmers in Kansas based on the "fundamental rule" that, once the Court accepts a case between states as involving sovereignty or quasi-sovereignty, "the 11th Amendment is not a factor." Second Report at 103. This "rule" misinterprets the Court's prior decisions, which recognize that a state's complaint may raise both proper proprietary or quasi-sovereign claims and improper claims for the benefit of individuals in one

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[7] There has been no suggestion that Colorado waived its sovereign immunity to claims by individual water users for violation of the Compact. *Cf. Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1950). Indeed, the premise of the Special Master's recommendation is that individual water users have no remedy.

action. For example, North Dakota raised both an improper claim for damages to individual farmers and a proper quasi-sovereign claim for injunctive relief to prevent flooding; the Court dismissed the first claim and considered the merits of the second. *North Dakota v. Minnesota*, 263 U.S. 365, 374-76 (1923). Hawaii raised an improper claim for economic damages to its citizens and a proper claim for economic damages to its proprietary interests, both based on the same monopolistic activities; the Court dismissed the first and allowed the second to proceed. *Hawaii v. Standard Oil Co.*, 405 U.S. at 262-64. The issue of jurisdiction (resolved by the Court's granting of Kansas' motion for leave to file its complaint in this case) is separate from the issue of remedies, still to be resolved. This Court's two-sentence order granting the motion for leave to file the complaint cannot be read as approving, sight unseen, any conceivable remedy Kansas might later request as part of a "proper original action."

The Special Master gives four reasons for rejecting Colorado's argument: (1) the nature of quasi-sovereignty; (2) the Court's statements in *Texas v. New Mexico*, 482 U.S. 124 (1987); (3) the Laramie River decisions, which used individual water rights as the basis for an interstate apportionment; and (4) the lack of any other remedy for Kansas water users. Second Report at 100-104. Colorado will deal with each of them in turn.

The Special Master first states that Colorado's argument is inconsistent with the basic concept of quasi-sovereignty because "[q]uasi-sovereignty throws the mantle of the state itself over the area and people involved in order *to permit a general recovery for them*, albeit the recovery is payable to the state itself." Second

Report at 101 (emphasis added). This misapprehends the nature of quasi-sovereignty. This Court has made it clear that the concept "does not involve the State stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982)[8]; *North Dakota v. Minnesota*, 263 U.S. at 376. Rather, to have *parens patriae* standing, the state must assert injury to its quasi-sovereign interests, *Snapp*, 458 U.S. at 601, which have consistently been described as "apart from the interests of particular private parties," *id.* at 607, "apart from that of the individuals affected," *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923), and "independent of and behind the titles of [a state's] citizens." *Snapp*, 458 U.S. at 604, *quoting Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907).[9]

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[8] *Snapp* involved the question of a state (or commonwealth's) standing to bring a *parens patriae* action in federal district court. The Court recognized that "a more circumspect inquiry may be required" into such an issue in original jurisdiction cases between states, to ensure that the 11th Amendment was not "too easily circumvented." 458 U.S. at 611 (Brennan, J., concurring); *see also id.* at 603 n.12.

[9] The nature of the concept of *parens patriae* and the distinction between damages to the state's *parens patriae* interest and citizens' individual rights is discussed in two excellent law review articles, Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 N.W.U.L.Rev. 193 (1970), and *State Protection of Its Economy and Environment*, 6 Colum.J.L. & Soc. Probs. 411 (1970), both of which are cited in *Hawaii v. Standard Oil Co.*, 405 U.S. at 257. Both articles persuasively demonstrate that a state's *parens patriae* interest is separate from the individual rights of its citizens, although quantification of damages to the state's quasi-sovereign interest may be difficult.

The interest which Kansas represents in this action is its quasi-sovereign "interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). A state's right to present its quasi-sovereign interest is distinct from its foregone sovereign right to present its citizens' individual claims as assignee or trustee. *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. at 392-93; *North Dakota v. Minnesota*, 263 U.S. at 374-76; *New Hampshire v. Louisiana*, 108 U.S. at 91. Interpreting quasi-sovereignty to allow Kansas to recover for losses to individual farmers in Kansas would eliminate the distinction drawn by the Court between allowable quasi-sovereign representation and improper sovereign trusteeship.

The Special Master's unprecedented definition of quasi-sovereignty also ignores the difference between injunctive relief and damages. The overwhelming majority of this Court's decisions on quasi-sovereignty have concerned claims for injunctive relief. As this Court has noted, "[O]ne injunction is as effective as 100; . . . 100 injunctions are no more effective than one." *Hawaii v. Standard Oil Co.*, 405 U.S. at 261. The fact that this Court has approved injunctions to vindicate states' quasi-sovereign interests which also may have benefited private individuals does not support stretching the mantle of quasi-sovereignty to include recovery of damages for injuries to private individuals.

Second, the Special Master states that "the key case on this subject, *Texas v. New Mexico*, 482 U.S. 124 (1987), speaks broadly of providing a remedy for past breaches [of an interstate compact]." Second Report at 101. The

Special Master also relies heavily on the Court's statement in *Texas v. New Mexico* that, "[i]n *proper* original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State." Second Report at 102, *quoting Texas v. New Mexico*, 482 U.S. at 130 (emphasis added). That case, however, simply determined for the first time that money damages could be awarded as a remedy for past breaches of an interstate compact. The Court's ruling that money damages could be awarded as a remedy did not address the particular elements which could be included in the calculation of such damages; that was left to the special master in that case to determine, *id.* at 132, and was ultimately resolved by a consent decree. *Texas v. New Mexico*, 494 U.S. 111 (1990). The Court's broad statement of its "complete judicial power" to resolve disputes among the states under the Constitution must therefore be read in light of its continuing recognition that the 11th Amendment limits the grant of judicial power under Article III of the Constitution. *Idaho v. Coeur d'Alene Tribe*, ___U.S. ___, ___, 117 S.Ct. 2028, 2033, 138 L.Ed.2d 438, 447 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. at ___, 116 S.Ct. at 1127, 134 L.Ed.2d at 271; *Hawaii v. Standard Oil Co.*, 405 U.S. at 258-59 n.12 and cases cited therein. The Special Master's reasoning confuses the power to resolve disputes between states with the power to resolve disputes between private individuals and states, which is constrained by the 11th Amendment.

The Special Master also relies on the Court's statement (in response to the argument that money damages would not benefit the actual injured parties) that "the State should recover any damages that may be awarded."

Second Report at 89, *quoting Texas v. New Mexico*, 482 U.S. at 132 n.7.[10] By referring to "*any* damages that *may* be awarded," the Court did not determine that Texas could recover damages for losses suffered by individual farmers. Rather, it simply recognized that any damages that Texas recovered for its representation of the "general public interest," *id.*, could be spent by Texas as it saw fit.[11]

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[10] The Court's statement was made in the following context:

> Texas counsel suggested that a money judgment might find its way into the general coffers of the State, rather than benefit those who were hurt. But the basis on which Texas was permitted to bring this original action is that enforcement of the Compact was of such general public interest that the sovereign State was a proper plaintiff. *See Maryland v. Louisiana*, 451 U.S. 725, 735-739 (1981). It is wholly consistent with that view that the State should recover any damages that may be awarded, money it would be free to spend in the way it determines is in the public interest.

482 U.S. at 132 n.7.

[11] It would be a strange interpretation of the 11th Amendment to allow a state to recover money damages for losses suffered by individuals only if it decides to keep the money in the state coffers rather than aiding the injured individuals. Such an interpretation would also be inconsistent with the determination in *Texas v. New Mexico* that the state "would be free to spend [the money] in the way it determines is in the public interest." 482 U.S. at 132 n.7. Therefore, the applicability of the 11th Amendment must depend not on how the state ultimately spends any damages it may recover, but on the nature and origin of the claims on which damages are based.

Third, the Special Master reads the Court's Laramie River decisions[12] as doing "exactly what Colorado now says it cannot do" because the equitable apportionment of the Laramie River was based on the prior appropriations of individual water users. Second Report at 94. The Laramie River cases, however, are consistent with the concept of quasi-sovereignty described above. Although the states' apportionments were based on use by their respective water users, they were not the *same* as those individual claims.[13] The final decision made this clear by stating that the apportionment "determine[d] only the relative rights of the two States," *Wyoming v. Colorado*, 309 U.S. 572, 575 (1940), and that each state could determine in-state uses according to its own laws. *Id.* at 579-81; *see also Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). Thus, the states' apportionments were "independent of and behind," *see Snapp*, 458 U.S. at 604, those of their water users.

If the states' quasi-sovereign interests in the waters of an interstate stream were simply based on the aggregation of their citizens' rights, the Court could not have declared:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding

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[12] *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Wyoming v. Colorado*, 286 U.S. 494 (1932); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Wyoming v. Colorado*, 309 U.S. 572 (1940).

[13] The Court held that, as between two states that followed the prior appropriation doctrine, priority of use should be the primary basis for determining the relative rights of the states. *Wyoming v. Colorado*, 259 U.S. at 470.

> principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former – these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

*Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

The Arkansas River Compact does not change the nature of Kansas' quasi-sovereign interest in this case. The Compact settles disputes "between the states of Colorado and Kansas, and between the citizens of one and citizens of the other state, . . . " Arkansas River Compact, Article I(A). It does *not* purport to resolve disputes between the citizens of Kansas and the State of Colorado, and the 11th Amendment embodies "the background principle of state sovereign immunity" which precludes such claims. *Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1131, 134 L.Ed.2d at 276-77.[14] Any waiver of such immunity must be clearly expressed. *See Port Authority Trans-*

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[14] *See also Seminole Tribe*, 517 U.S. at ___ n.13, 116 S.Ct. at 1140 n.13, 134 L.Ed.2d at 288 n.13 (Stevens, J., dissenting) (11th Amendment designed primarily to prevent states from being sued for debt collection).

*Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990).[15] Further, the fact that Colorado's proposed water remedy may benefit water users in Kansas does not somehow give Kansas the right to recover damages from Colorado for losses suffered by water users in Kansas. Water would be delivered *to Kansas*.[16] Delivery to, and benefits to, Kansas water users are matters left to Kansas. Arkansas River Compact, Article VI(A)(1). This is simply an instance in which equitable relief obtained by a state in its quasi-sovereign capacity may benefit private individuals.

Fourth, the Special Master states that Kansas is the signatory to the Arkansas River Compact and the only party that can sue to protect the Stateline flows guaranteed for use by Kansas water users under the Compact. Second Report at 103. He concludes that Kansas "would be a feeble representative" if it could not recover damages for losses suffered by individual farmers. *Id.*

The Special Master's reasoning elevates equitable considerations above the principle of state sovereign

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[15] The Court will give effect to a State's waiver of Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction.

*Id., quoting Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 (1985) (quotation marks omitted).

[16] The Court said in *Texas v. New Mexico* that delivering more water to make up shortfalls "has all the earmarks of specific performance, an equitable remedy that requires some attention to the relative benefits and burdens that the parties may enjoy or suffer as compared with a legal remedy in damages." *Texas v. New Mexico*, 482 U.S. at 131.

immunity embodied in the 11th Amendment, which prevents individual farmers from recovering damages from Colorado. *See Seminole Tribe*, 517 U.S. at ___, 116 S.Ct. at 1131-32, 134 L.Ed.2d at 276-77. The fact that those claims are barred does not allow Kansas to recover those losses. *New Hampshire v. Louisiana*, 108 U.S. at 91. Rather, it is the Special Master who disregards the fundamental principle that "[a]n action brought by one state against another violates the Eleventh Amendment if the plaintiff State is actually suing to recover for injuries to designated individuals." *Hawaii v. Standard Oil Co.*, 405 U.S. at 258-59 n.12. The Special Master's reasoning would make Kansas a sovereign trustee, able to recover for injuries to individuals when those individuals cannot.

The Special Master restates, and implicitly accepts, Kansas' argument that "under the compact a state and its citizens are treated as one." Second Report at 99. If Kansas actually owned the water rights which its water users exercise, the Special Master's decision might fit within the reasoning of *South Dakota v. North Carolina*, 192 U.S. 286 (1904), in which South Dakota was allowed to recover on North Carolina bonds which were "given outright and absolutely to the state." *Id.* at 310. But the assumption that Kansas' rights under the Compact and the water rights of individual Kansas water users are identical is erroneous and unsupported. There has certainly been no outright transfer of rights, as there was in *South Dakota v. North Carolina*. Neither the Special Master nor Kansas has pointed to any language in the Compact which effects such a transfer of rights; nor do this Court's previous decisions support such an assumption. To say that private

water rights may be circumscribed by a state's overarching compact apportionment, *see Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), or that a state's compact apportionment may be based on or even "indissolubly linked" to private water rights, *see Wyoming v. Colorado*, 286 U.S. at 508, is not to say that the two are identical.

The inclusion of losses to individuals in Kansas' recovery is unprecedented and contrary to the 11th Amendment. Colorado respectfully urges the Court to grant Colorado's exception to the Special Master's recommendation.

## II. PREJUDGMENT INTEREST SHOULD NOT BE AWARDED ON KANSAS' UNLIQUIDATED CLAIM AGAINST COLORADO

Kansas argued that an award of prejudgment interest is necessary to provide complete compensation for injuries resulting from Colorado's violation of the Compact. Second Report at 105. Colorado opposed such an award on the grounds that Kansas did not complain about a compact violation until 1984 at the earliest, that thereafter there was a good-faith dispute over compact compliance, and that the amount of any depletion was not readily ascertainable. *See id.* at 105-06. Colorado noted that the common law rule is that prejudgment interest is not awarded on unliquidated damages and that prejudgment interest had not been awarded on judgments in cases between states, absent a clear obligation to pay prejudgment interest. *E.g., Virginia v. West Virginia*, 238 U.S. 202, 234-35 (1915).

The Special Master concludes that if the remedy here includes money damages, the unliquidated nature of Kansas' claim does not, as a matter of law, bar an award of prejudgment interest. Second Report at 110. In reaching this conclusion, the Special Master relies heavily on the Court's recent decision in *City of Milwaukee v. Cement Div., National Gypsum Co.*, 515 U.S. 189 (1995), and on cases which involved statutory awards of prejudgment interest.

As the Special Master acknowledges, *City of Milwaukee* was an admiralty case, where the general rule has been to allow prejudgment interest. Second Report at 108. He cites the Court's observation that the distinction between liquidated and unliquidated claims "has faced trenchant criticism for a number of years." *Id.* at 106, *citing City of Milwaukee*, 515 U.S. at 197. However, the cases cited by the Court as examples of "trenchant criticism" involved awards of prejudgment interest granted pursuant to statutory provisions. For example, *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163 (1933), simply determined that a New York statute providing for prejudgment interest was not an unconstitutional impairment of contracts. While there has been a trend in recent years to allow prejudgment interest on unliquidated claims, that trend has been primarily the result of legislative action. *Cf. Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330, 339 (1988) (denying prejudgment interest in FELA claims because of congressional inaction to change longstanding common law rule).

The Court has found prejudgment interest to be appropriate to effectuate the purpose of federal remedial schemes, which typically include detailed enforcement

provisions, including time limits for bringing claims. *See, e.g., Loeffler v. Frank*, 486 U.S. 549 (1988) (approving prejudgment interest in sex discrimination case against U.S. Postal Service); 42 U.S.C. §2000e-16(c) (imposing time limit for bringing such claims). Statutory provisions providing for prejudgment interest have also been accompanied by legislative changes placing other limits on liability. *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654-55 (1983) (noting that 1946 change in patent infringement law providing for prejudgment interest contained corresponding change eliminating recovery of infringer's profits).[17]

As the Special Master recognizes, "Kansas' claim for damages in this case certainly represents an unliquidated claim." Second Report at 110. Colorado's violation of the Compact was not willful or deliberate, First Report at 169, Second Report at 77-78, 80, and determining material depletions of usable Stateline flows due to wells "is not simple." First Report at 161. This Court found that the "vague and conflicting evidence" concerning well depletions excused Kansas' failure to raise its claims for 35 years. *Kansas v. Colorado*, 514 U.S. at 688. Given these facts and the lack of a time limitation on actions for violation of an interstate compact, this is not a case in which to cast aside the traditional rule against awarding prejudgment interest on unliquidated claims.

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[17] *General Motors Corp.* also recited the common law standard (which the Court would presumably have followed in the absence of a statutory change), under which "prejudgment interest could not be awarded where damages were unliquidated absent bad faith or other exceptional circumstances." 461 U.S. at 653.

## III. THE SPECIAL MASTER'S RULINGS WILL HAVE FAR-REACHING AND UNINTENDED CONSEQUENCES

As Colorado has explained above, the Special Master's ruling on recovery of damages for losses by individuals creates an unprecedented expansion of the concept of quasi-sovereignty. The Special Master's rulings also have the potential to encourage interstate litigation, to discourage the resolution of interstate disputes through mutual accommodation and agreement, and to increase the risk of double recoveries.

The award of money damages for breach of an interstate compact equitably apportioning an interstate stream is a relatively new concept. *Texas v. New Mexico* is the only case of which Colorado is aware where the award of such damages was approved, and the scope of damages was not ruled on, but resolved by consent decree. As this Court has noted, "there is a striking contrast between the potential impact of suits for injunctive relief and suits for damages." *Hawaii v. Standard Oil Co.*, 405 U.S. at 262. However, *parens patriae* actions by states to vindicate quasi-sovereign interests are being brought with increasing frequency in the lower courts against defendants other than states. *See, e.g., In re Edmond*, 934 F.2d 1304 (4th Cir. 1991); *People ex rel. Abrams v. Seneci*, 817 F.2d 1015 (2d Cir. 1987); *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981); *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973); *Maine v. M/V Tamano*, 357 F.Supp. 1097 (D. Maine 1973). *Parens patriae* actions do not depend on whether individuals are foreclosed from separate recovery, but whether the state has an independent interest behind the

titles or interests of its citizens. *See Pennsylvania v. Porter*, 659 F.2d at 318 n.16, and cases cited therein.

Because the 11th Amendment is not a factor in such cases, careful application of the concept of quasi-sovereignty is necessary to avoid the risk of double recoveries. Unless this Court corrects it, the Special Master's fusion of states' quasi-sovereign interests with the private interests of their citizens will confuse the distinction between the two and increase the risk of double recoveries. Following the Special Master's reasoning, states may bring *parens patriae* actions for damages to individuals for civil rights violations, *see Porter*, for employment discrimination, *see Snapp*, or in bankruptcy proceedings, *see Edmond*; yet defendants may remain subject to suits by individuals to recover for the identical injuries.

Further, even a state which did not intend to recover for its citizens' injuries would have to be extremely careful in circumscribing its environmental enforcement proceedings, so that defendants would not be able to use judgments by the state to foreclose claims by individuals for damages to their private property. *See Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (because of nature of *parens patriae* representation, previous state judgment against polluter for natural resources damages did *not* foreclose claims by individuals for damages to private property).

More troublesome are the implications of the Special Master's recommendations for the formation of interstate compacts. The Special Master's recommendations expand the effect of the Arkansas River Compact beyond its

terms and subject Colorado to potentially enormous damages for a violation which was not apparent for 35 years, which was not deliberate or willful, and for which no statute of limitations has been recognized. This Court has repeatedly encouraged states to resolve controversies through compacts rather than by resort to litigation in this Court, *see Texas v. New Mexico*, 462 U.S. 554, 575 (1983), and cases cited therein; yet the Special Master's recommendation may make states hesitate to enter into compacts when the consequences of a non-deliberate, non-willful breach may be enormous.

Further, the Special Master's recommendations will encourage litigation between states in this Court by opening the door to recovery for losses to individuals (including prejudgment interest on such losses) that would be barred by the 11th Amendment if brought by the individuals themselves. The Special Master's recommendations also create a financial incentive for delay in enforcing interstate compacts. Rather than redressing injuries through prompt investigation or enforcement, a state may sit back, say nothing, and then decades later reap profits by converting individuals' injuries to a state recovery.

Colorado respectfully requests that the Court correct the Special Master's recommendations on money damages based on losses incurred by water users in Kansas and on the applicability of prejudgment interest.

Respectfully submitted this 20th day of November, 1997.

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## ARKANSAS RIVER COMPACT, 1948

The State of Colorado and the State of Kansas, parties signatory to this Compact (hereinafter referred to as "Colorado" and "Kansas", respectively, or individually as a "State", or collectively as the "States") having resolved to conclude a compact with respect to the waters of the Arkansas River, and being moved by considerations of interstate comity, having appointed commissioners as follows: "Henry C. Vidal, Gail L. Ireland, and Harry B. Mendenhall, for Colorado; and George S. Knapp, Edward F. Arn, William E. Leavitt, and Roland H. Tate, for Kansas"; and the consent of the Congress of the United States to negotiate and enter into an interstate compact not later than January 1, 1950, having been granted by Public Law 34, 79th Congress, 1st Session, and pursuant thereto the President having designated Hans Kramer as the representative of the United States, the said commissioners for Colorado and Kansas, after negotiations participated in by the representatives of the United States, have agreed as follows:

### ARTICLE I

The major purposes of this Compact are to:

A. Settle existing disputes and remove causes of future controversy between the States of Colorado and Kansas, and between citizens of one and citizens of the other State, concerning the waters of the Arkansas River and their control, conservation and utilization for irrigation and other beneficial purposes.

B. Equitably divide and apportion between the States of Colorado and Kansas the waters of the Arkansas River and their utilization as well as the benefits arising from the construction, operation and maintenance by the United States of John Martin Reservoir Project for water conservation purposes.

## ARTICLE II

The provisions of this Compact are based on (1) the physical and other conditions peculiar to the Arkansas River and its natural drainage basin, and the nature and location of irrigation and other developments and facilities in connection therewith; (2) the opinion of the United States Supreme Court entered December 6, 1943, in the case of *Colorado v. Kansas* (320 U.S. 383) concerning the relative rights of the respective States in and to the use of waters of the Arkansas River; and (3) the experience derived under various interim executive agreements between the two States apportioning the waters released from the John Martin Reservoir as operated by the Corps of Engineers.

## ARTICLE III

As used in this Compact:

A. The word "Stateline" means the geographical boundary line between Colorado and Kansas.

B. The term "waters of the Arkansas River" means the waters originating in the natural drainage basin of the Arkansas River, including its tributaries, upstream from

the Stateline, and excluding waters brought into the Arkansas River Basin from other river basins.

C. The term "Stateline flow" means the flow of waters of the Arkansas River as determined by gaging stations located at or near the Stateline. The flow as determined by such stations, whether located in Colorado or Kansas, shall be deemed to be the actual Stateline flow.

D. "John Martin Reservoir Project" is the official name of the facility formerly known as Caddoa Reservoir Project, authorized by the Flood Control Act of 1936, as amended, for construction, operation and maintenance by the War Department, Corps of Engineers, later designated as the Corps of Engineers, Department of the Army, and herein referred to as the "Corps of Engineers". "John Martin Reservoir" is the water storage space created by "John Martin Dam".

E. The "flood control storage" is that portion of the total storage space in John Martin Reservoir allocated to flood control purposes.

F. The "conservation pool" is that portion of the total storage space in John Martin Reservoir lying below the flood control storage.

G. The "ditches of Colorado Water District 67" are those ditches and canals which divert water from the Arkansas River or its tributaries downstream from John Martin Dam for irrigation use in Colorado.

H. The term "river flow" means the sum of the flows of the Arkansas and the Purgatoire Rivers into John Martin Reservoir as determined by gaging stations appropriately located above said Reservoir.

I. The term "the Administration" means the Arkansas River Compact Administration established under Article VIII.

## ARTICLE IV

Both States recognize that:

A. This Compact deals only with the waters of the Arkansas River as defined in Article III.

B. This Compact is not concerned with the rights, if any, of the State of New Mexico or its citizens in and to the use in New Mexico of waters of Trinchera Creek or other tributaries of the Purgatoire River, a tributary of the Arkansas River.

C. (1) John Martin Dam will be operated by the Corps of Engineers to store and release the waters of the Arkansas River in and from John Martin Reservoir for its authorized purposes.

(2) The bottom of the flood control storage is presently fixed by the Chief of Engineers, U.S. Army, at elevation 3,851 feet above mean sea level. The flood control storage will be operated for flood control purposes and to those ends will impound or regulate the streamflow volumes that are in excess of the then available storage capacity of the conservation pool. Releases from the flood control storage may be made at times and rates determined by the Corps of Engineers to be necessary or advisable without regard to ditch diversion capacities or requirements in either or both States.

(3) The conservation pool will be operated for the benefit of water users in Colorado and Kansas, both

upstream and downstream from John Martin Dam, as provided in this Compact. The maintenance of John Martin Dam and appurtenant works may at times require the Corps of Engineers to release water then impounded in the conservation pool or to prohibit the storage of water therein until such maintenance work is completed. Flood control operation may also involve temporary utilization of conservation storage.

D. This Compact is not intended to impede or prevent future beneficial development of the Arkansas River basin in Colorado and Kansas by Federal or State agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoir, and other works for the purpose of water utilization and control, as well as the improved or prolonged functioning of existing works: Provided, that the waters of the Arkansas River, as defined in Article III, shall not be materially depleted in usable quantity or availability for use to the water users in Colorado and Kansas under this Compact by such future development or construction.

## ARTICLE V

Colorado and Kansas hereby agree upon the following basis of apportionment of the waters of the Arkansas River:

A. Winter storage in John Martin Reservoir shall commence on November 1st of each year and continue to and include the next succeeding March 31st. During said period all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water

equivalent to the river flow, but such releases shall not exceed 100 c.f.s. (cubic feet per second) and water so released shall be used without avoidable waste.

B. Summer storage in John Martin Reservoir shall commence on April 1st of each year and continue to and include the next succeeding October 31st. During said period, except when Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, all water entering said reservoir up to the limit of the then available conservation capacity shall be stored: Provided, that Colorado may demand releases of water equivalent to the river flow up to 500 c.f.s., and Kansas may demand releases of water equivalent to that portion of the river flow between 500 c.f.s. and 750 c.f.s., irrespective of releases demanded by Colorado.

C. Releases of water stored pursuant to the provisions of paragraphs A and B of this Article shall be made upon demands by Colorado and Kansas concurrently or separately at any time during the summer storage period. Unless increases to meet extraordinary conditions are authorized by the Administration, separate releases of stored water to Colorado shall not exceed 750 c.f.s., separate releases of stored water to Kansas shall not exceed 500 c.f.s., and concurrent releases of stored water shall not exceed a total of 1,250 c.f.s.: Provided, that when water stored in the conservation pool is reduced to a quantity less than 20,000 acre-feet, separate releases of stored water to Colorado shall not exceed 600 c.f.s., separate releases of stored water to Kansas shall not exceed 400 c.f.s., and concurrent releases of stored water shall not exceed 1,000 c.f.s.

D. Releases authorized by paragraphs A, B and C of this Article, except when all Colorado water users are operating under decreed priorities as provided in paragraphs F and G of this Article, shall not impose any call on Colorado water users that divert waters of the Arkansas River upstream from John Martin Dam.

E. (1) Releases of stored water and releases of river flow may be made simultaneously upon the demands of either or both States.

(2) Water released upon concurrent or separate demands shall be applied promptly to beneficial use unless storage thereof downstream is authorized by the Administration.

(3) Releases of river flow and of stored water to Colorado shall be measured by gaging stations located at or near John Martin Dam and the releases to which Kansas is entitled shall be satisfied by an equivalent in Stateline flow.

(4) When water is released from John Martin Reservoir appropriate allowances as determined by the Administration shall be made for the intervals of time required for such water to arrive at the points of diversion in Colorado and at the Stateline.

(5) There shall be no allowance or accumulation of credits or debits for or against either State.

(6) Storage, releases from storage and releases of river flow authorized in this Article shall be accomplished pursuant to procedures prescribed by the Administration under the provisions of Article VIII.

F. In the event the Administration finds that within a period of fourteen (14) days the water in the conservation pool will be or is liable to be exhausted, the Administration shall forthwith notify the State Engineer of Colorado, or his duly authorized representative, that commencing upon a day certain within said fourteen (14) day period, unless a change of conditions justifies cancellation or modification of such notice, Colorado shall administer the decreed rights of water users in Colorado Water District 67 as against each other and as against all rights now or hereafter decreed to water users diverting upstream from John Martin Dam on the basis of relative priorities in the same manner in which their respective priority rights were administered by Colorado before John Martin Reservoir began to operate and as though John Martin Dam had not been constructed. Such priority administration by Colorado shall be continued until the Administration finds that water is again available in the conservation pool for release as provided in this Compact, and timely notice of such finding shall be given by the Administration to the State Engineer of Colorado or his duly authorized representative: Provided, that except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this Compact, when there is water in the conservation pool the water users upstream from John Martin Reservoir shall not be affected by the decrees to the ditches in Colorado Water District 67. Except when administration in Colorado is on a priority basis the water diversions in Colorado Water District 67 shall be administered by Colorado in accordance with distribution agreements made

from time to time between the water users in such District and filed with the Administration and with the State Engineer of Colorado or, in the absence of such agreement, upon the basis of the respective priority decrees, as against each other, in said District.

G. During periods when Colorado reverts to administration of decreed priorities, Kansas shall not be entitled to any portion of the river flow entering John Martin Reservoir. Waters of the Arkansas River originating in Colorado which may flow across the Stateline during such periods are hereby apportioned to Kansas.

H. If the usable quantity and available for use of the waters of the Arkansas River to water users in Colorado Water District 67 and Kansas will be thereby materially depleted or adversely affected, (1) priority rights now decreed to the ditches of Colorado Water District 67 shall not hereafter be transferred to other water districts in Colorado or to points of diversion or places of use upstream from John Martin Dam; and (2) the ditch diversion rights from the Arkansas River in Colorado Water District 67, and of Kansas ditches between the Stateline and Garden City shall not hereafter be increased beyond the total present rights of said ditches, without the Administration, in either case (1) or (2), making findings of fact that no such depletion or adverse effect will result from such proposed transfer or increase. Notice of legal proceedings for any such proposed transfer or increase shall be given to the Administration in the manner and within the time provided by the laws of Colorado or Kansas in such cases.

## ARTICLE VI

A. (1) Nothing in this Compact shall be construed as impairing the jurisdiction of Kansas over the waters of the Arkansas River that originate in Kansas and over the waters that flow from Colorado across the Stateline into Kansas.

(2) Except as otherwise provided, nothing in this Compact shall be construed as supplanting the administration by Colorado of the rights of appropriators of waters of the Arkansas River in said State as decreed to said appropriators by the courts of Colorado, nor as interfering with the distribution among said appropriators by Colorado, nor as curtailing the diversion and use for irrigation and other beneficial purposes in Colorado of the waters of the Arkansas River.

B. Inasmuch as the Frontier Canal diverts waters of the Arkansas River in Colorado west of the Stateline for irrigation uses in Kansas only, Colorado concedes to Kansas and Kansas hereby assumes exclusive administrative control over the operation of the Frontier Canal and its headworks for such purposes, to the same extent as though said works were located entirely within the State of Kansas. Water carried across the Stateline in the Frontier Canal or another similarly situated canal shall be considered to be part of the Stateline flow.

## ARTICLE VII

A. Each State shall be subject to the terms of this Compact. Where the name of the State or the term "State" is used in this Compact these shall be construed to

include any person or entity of any nature whatsoever using, claiming or in any manner asserting any right to the use of the waters of the Arkansas River under the authority of that State.

B. This Compact establishes no general principle or precedent with respect to any other interstate stream.

C. Wherever any State or Federal official or agency is referred to in this Compact such reference shall apply to the comparable official or agency succeeding to their duties and functions.

## ARTICLE VIII

A. To administer the provisions of this Compact there is hereby created an interstate agency to be known as the Arkansas River Compact Administration herein designated as "The Administration."

B. The Administration shall have power to:

(1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of this Compact;

(2) Prescribe procedures for the administration of this Compact: Provided, that where such procedures involve the operation of John Martin Reservoir Project they shall be subject to the approval of the District Engineer in charge of said Project;

(3) Perform all functions required to implement this Compact and to do all things necessary, proper or convenient in the performance of its duties.

C. The membership of the Administration shall consist of three representatives from each State who shall be appointed by the respective Governors for a term not to exceed four years. One Colorado representative shall be a resident of and water right owner in Water Districts 14 or 17, one Colorado representative shall be a resident of and water right owner in Water District 67, and one Colorado representative shall be the Director of the Colorado Water Conservation Board. Two Kansas representatives shall be residents of and water right owners in the counties of Finney, Kearny or Hamilton, and one Kansas representative shall be the chief State official charged with the administration of water rights in Kansas. The President of the United States is hereby requested to designate a representative of the United States, and if a representative is so designated he shall be an ex-officio member and act as chairman of the Administration without vote.

D. The State representatives shall be appointed by the respective Governors within thirty days after the effective date of this Compact. The Administration shall meet and organize within sixty days after such effective date. A quorum for any meeting shall consist of four members of the Administration: Provided, that at least two members are present from each State. Each State shall have but one vote in the Administration and every decision, authorization or other action shall require unanimous vote. In case of a divided vote on any matter within the purview of the Administration, the Administration may, by subsequent unanimous vote, refer the matter for arbitration to the Representative of the United States or other arbitrator or arbitrators, in which event

the decision made by such arbitrator or arbitrators shall be binding upon the Administration.

E. (1) The salaries, if any, and the personal expenses of each member shall be paid by the government which he represents. All other expenses incident to the administration of this Compact which are not paid by the United States shall be borne by the States on the basis of 60 per cent by Colorado and 40 per cent by Kansas.

(2) In each even numbered year the Administration shall adopt and transmit to the Governor of each State its budget covering anticipated expenses for the forthcoming biennium and the amount thereof payable by each State. Each State shall appropriate and pay the amount due by it to the Administration.

(3) The Administration shall keep accurate accounts of all receipts and disbursements and shall include a statement thereof, together with a certificate of audit by a certified public accountant, in its annual report. Each State shall have the right to make an examination and audit of the accounts of the Administration at any time.

F. Each State shall provide such available facilities, equipment and other assistance as the Administration may need to carry out its duties. To supplement such available assistance the Administration may employ engineering, legal, clerical, and other aid as in its judgment may be necessary for the performance of its functions. Such employees shall be paid by and be responsible to the Administration, and shall not be considered to be employees of either State.

G. (1) The Administration shall cooperate with the chief official of each State charged with the administration of water rights and with Federal agencies in the systematic determination and correlation of the facts as to the flow and diversion of the waters of the Arkansas River and as to the operation and siltation of John Martin Reservoir and other related structures. The Administration shall cooperate in the procurement, interchange, compilation and publication of all factual data bearing upon the administration of this Compact without, in general, duplicating measurements, observations or publications made by State or Federal agencies. State officials shall furnish pertinent factual data to the Administration upon its request. The Administration shall, with the collaboration of the appropriate Federal and State agencies, determine as may be necessary from time to time, the location of gaging stations required for the proper administration of this Compact and shall designate the official records of such stations for its official use.

(2) The Director, U.S. Geological Survey, the Commissioner of Reclamation and the Chief of Engineers, U.S. Army, are hereby requested to collaborate with the Administration and with appropriate State officials in the systematic determination and correlation of data referred to in paragraph G(1) of this Article and in the execution of other duties of such officials which may be necessary for the proper administration of this Compact.

(3) If deemed necessary for the administration of this Compact, the Administration may require the installation and maintenance, at the expense of water users, of measuring devices of approved type in any ditch or group of ditches diverting water from the Arkansas

River in Colorado or Kansas. The chief official of each State charged with the administration of water rights shall supervise the execution of the Administration's requirements for such installations.

H. Violation of any of the provisions of this Compact or other actions prejudicial thereto which come to the attention of the Administration shall be promptly investigated by it. When deemed advisable as the result of such investigation, the Administration may report its findings and recommendations to the State official who is charged with the administration of water rights for appropriate action, it being the intent of this Compact that enforcement of its terms shall be accomplished in general through the State agencies and officials charged with the administration of water rights.

I. Findings of fact made by the Administration shall not be conclusive in any court or before any agency or tribunal but shall constitute prima facie evidence of the facts found.

J. The Administration shall report annually to the Governors of the States and to the President of the United States as to matters within its purview.

## ARTICLE IX

A. This Compact shall become effective when ratified by the Legislature of each State and when consented to by the Congress of the United States by legislation providing substantially, among other things, as follows:

"Nothing contained in this Act or in the Compact herein consented to shall be construed as impairing or

affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area or waters which are the subject of such Compact: Provided, that the Chief of Engineers is hereby authorized to operate the conservation features of the John Martin Reservoir Project in a manner conforming to such Compact with such exceptions as he and the Administration created pursuant to the Compact may jointly approve."

B. This Compact shall remain in effect until modified or terminated by unanimous action of the States and in the event of modification or termination all rights then established or recognized by this Compact shall continue unimpaired.

IN WITNESS WHEREOF, The commissioners have signed this Compact in triplicate original, one of which shall be forwarded to the Secretary of State of the United States of America and one of which shall be forwarded to the Governor of each signatory State.

Done in the City and County of Denver, in the state of Colorado, on the fourteenth day of December, in the Year of our Lord One Thousand Nine Hundred and Forty-eight.

Henry C. Vial
Gail L. Ireland
Harry B. Mendenhall
Commissioners for Colorado

George S. Knapp
Edward F. Arn
William E. Leavitt
Roland H. Tate
Commissioners for Kansas

Attest:
Warden L. Noe
Secretary

Approved:
Hans Kramer
Representative of the United States